

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FRANK E. HASCHAK, Individually	:	
and as Co-Administrator of the	:	
ESTATE OF DERRICK HASCHAK, AND	:	
CATHY HASCHAK, Individually	:	
and as Co-Administrator of the	:	CIVIL ACTION
ESTATE OF DERRICK HASCHAK	:	
	:	NO. 98-4740
	:	
v.	:	
	:	
NATIONAL RAILROAD PASSENGER	:	
CORP. (AMTRAK)	:	

MEMORANDUM ORDER

This is a wrongful death and survival action. There is diversity and federal question jurisdiction. Defendant is a federally chartered and owned corporation. See Nero v. AMTRAK, 714 F. Supp. 753, 754 (E.D. Pa. 1989). Presently before the court is plaintiffs' Motion to Dismiss and/or Strike Defendant's Crossclaim Against Plaintiff.

Plaintiffs seek to recover damages arising from the death of their twelve-year-old son Derrick, who was hit and killed by a train operated by defendant. Plaintiffs allege that defendant caused the accident by negligently operating the train and by failing to take measures to prevent the child's access to the tracks. Defendant denies the allegations and asserts a crossclaim against plaintiffs for contribution or indemnification premised on their alleged failure properly to warn or supervise their son.

Plaintiffs move for the dismissal of the crossclaim on

the ground that a crossclaim cannot be filed against an adverse party. Plaintiffs are technically correct. It is apparent from its response, however, that defendant intended to file a counterclaim. "All pleadings shall be so construed as to do substantial justice." See Fed. R. Civ. P. 8(f). The court will construe the mislabelled crossclaim as a counterclaim. See 6 Charles Alan Wright et al., Federal Practice and Procedure § 1407 (2d ed. 1998) (courts ignore nomenclature and treat a claim as if it had been properly labeled).

In their reply brief, plaintiffs argue that even if viewed as a counterclaim, it must be dismissed as premature. A counterclaim for indemnification or contribution contingent upon disposition of the plaintiffs' claim against a defendant is not a matured claim as contemplated by Fed. R. Civ. P. 13. See Stahl v. Ohio River Co., 424 F.2d 52, 56 (3d Cir. 1970). The appropriate procedure if defendant wishes to pursue a contribution claim based on negligent supervision against the Haschaks would be a motion to sever their individual claims pursuant to Fed. R. Civ. P. 21 and then joinder of each plaintiff as a third-party defendant pursuant to Rule 14(a). Id. at 55; Matthews v. Watson, 1988 WL 99653, at *2 (E.D. Pa. Sep. 22, 1988).

While the crossclaim/counterclaim as pled is addressed to both claims, it would appear to be applicable only to the

survival claim. Principles of contributory or comparative negligence would apply to the wrongful death claim. See Skell v. Crown American Corp. 670 F. Supp. 153, 155 (W.D. Pa. 1987); Frankel v. Burke's Excavating, Inc., 223 F. Supp. 945, 947 (E.D. Pa. 1963).

It also appears that there is no cognizable claim for indemnification. Plaintiffs allege, inter alia, that defendant operated the train which struck their son at an excessive speed around a very sharp curve in a densely populated area. A right to indemnity enures only to a party who without active fault has a legal obligation to pay damages for a loss caused by the negligence of another. Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303, 316 (3d Cir. 1985); TVSM, Inc. v. Alexander & Alexander, Inc., 583 F. Supp. 1089, 1091-92 (E.D. Pa. 1984); Burbage v. Boiler Engineering and Supply Co., Inc., 249 A.2d 563, 567 (Pa. 1969).

ACCORDINGLY, this day of February, 1999, upon consideration of Plaintiffs' Motion to Dismiss and/or Strike Defendant's Crossclaim (Doc. #3), **IT IS HEREBY ORDERED** that said Motion is **GRANTED** in that defendant's crossclaim is dismissed without prejudice to defendant to seek to sever plaintiffs' individual claims and to join them as third-party defendants.

BY THE COURT:

JAY C. WALDMAN, J.